89- 1665

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1989

TIMOTHY KIRKLAND,

Petitioner,

vs.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fifth Circuit Court of Appeals has overturned a jury's verdict as to the exercise of free speech by a public high school teacher in the selection of extra credit reading materials for his history classes.

The questions presented for review are:

1. Under the First Amendment, when does speech in the work place raise to protected speech?

2. Under the First Amendment, are teachers' methods or techniques protected?

3. What are the standards to determine whether a public school teacher was discharged in violation of the First Amendment?

4. What is the appellate standard of review of a trial court's determination that speech has risen to a protected level?

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To the Supreme Court of the United States:

Timothy Kirkland, who is the petitioner, petitions the Court to issue a writ of certiorari to the United States Court of Appeals and to review by that writ the judgment which the Court of Appeals rendered on December 22, 1989.

OPINION DELIVERED IN THE COURT BELOW

The Court of Appeals delivered an opinion which is published under *Kirkland v. Northside Independent School*

District, 890 F.2d 794 (5th Cir., 1989). A copy of the opinion is in the Appendix. The District Court for the Western District of Texas entered Judgment on October 14, 1988, a copy of which is attached hereto in the Appendix. Based upon the rulings of the Court and a jury verdict, a judgment was rendered; a copy of the Special Interrogatories are attached hereto. The United States District Court for the Western District of Texas denied the Defendant's Motion for Judgment Notwithstanding the Verdict and in the Alternative, Motion for New Trial on October 31, 1988; a copy of the Order is attached hereto.

STATEMENT OF JURISDICTION

On December 22, 1989, the Court of Appeals rendered and entered the judgment sought to be reviewed. The Court of Appeals, on January 25, 1990, denied the Petition for Rehearing filed by Appellee. Jurisdiction is asserted pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

First Amendment, U. S. Constitution. Religious and political freedom:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. Sec. 1983. Deprivation of civil rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. Sec. 1979; Dec. 29, 1979, P.L. 96-170, Sec. 1, 93 Stat. 1284).

STATEMENT OF THE CASE

1. Nature of the Case

This is a civil case where Petitioner sought reinstatement and back benefits for a wrongful termination because of an exercise of his First Amendment right to free speech. The case was brought pursuant to 42 U.S.C. Sec. 1983 because the Petitioner was a public school teacher working for an independent school district organized under the laws of the State of Texas. The Court below conducted a jury trial whereby the Plaintiff was awarded $50,000.00 in back wages and benefits, $16,826.80 in attorney's fees and reinstatement to his position with the Northside Independent School District.

The Respondent appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals applying narrow standards of free speech in the work place and standards of review by Appellate Courts reversed and

remanded the action. By corrected judgment, the Court reversed and rendered a take-nothing judgment.

2. Facts Material to the Question Presented

The controversy surrounding extra credit reading and the books used for that purpose was an ongoing dispute with the constituents of the Northside Independent School District. Testimony given at the time of trial indicated that there were two groups of citizens. One, a fundamentalist religious based group, advocated the removal of books from the library and from use by the school district if they contained adult language, violence or sex. The second, a group of citizens interested in a less restrictive learning environment for the children of the school district, championed free access to literature. Testimony indicated that in the year prior to the termination of the Petitioner, there had been a public controversy over the use of the book "Clan of the Cave Bears" as extra credit reading for history students in Taft High School. It is significant that Petitioner was also a history teacher at Taft High School, although he was not the teacher involved with the "Clan of the Cave Bears" incident.

Testimony of an Assistant Superintendent of Respondent confirmed that the book policy requiring prior approval was instituted to prevent any further public outcries about certain books being used by the teachers of the District.

Finally, Petitioner's book list, although not pre-approved pursuant to the rules set up by the school district for prior inspection and screening, contained only books

that could be found in the Taft High School library. Petitioner's list also included what would be considered classics and current best sellers. Additionally, the book list contained a provision for both teacher approval and parental approval of the student's selection. A copy of the book list is attached hereto in the Appendix.

3. Basis for Federal Jurisdiction in the District Court

The basis for federal jurisdiction of the United States District Court, which is the court of first instance, is 42 U.S.C. Sec. 1983.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Conflict in Decisions: First Amendment Rights of Public School Teachers in the Work Place

The question of First Amendment rights of public school teachers in the work place is a two-fold question dealing with what speech of a public school teacher raises to protected speech and whether teachers' methods or techniques of teaching are protected by the First Amendment. The standard to determine whether a public school teacher was discharged because of the exercise of a First Amendment right is the crucial element in this case. The Court in *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), ruled that, "vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of the employees' speech." The Fifth

Circuit, in the case of *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989), has set a standard that is contrary to the "*Rankin* rule." It allows employers to curtail free speech if they deem it internal and disruptive. Applying this rule, the Court found that the statements made by the Petitioner did not rise to public concern. This is a direct conflict with the Court's ruling.

The circuits are in conflict and disagreement as to the proper standards for determining when employee speech rises to public concern. The Fourth, Seventh, Eighth and Eleventh Circuits follow the Fifth's rule in *Price*, 874 F.2d at 257, that free speech in the work place cannot contradict established curriculum content or spread disharmony within the educational institutions.

The confusion lies in that the circuits are in conflict with each other and many times are in conflict with previous rulings. The Fifth Circuit in *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516 (5th Cir. 1980) said that the regulation of time, place and manner of regulating free speech is unreasonable on its face. However, this was swept aside by the ruling in *Price*, 874 F.2d at 257. The First, Sixth, Ninth and Tenth Circuits follow the Fifth Circuit rule in *Shamloo*, 620 F.2d at 522.

Finally, the Tenth Circuit has established in the case of *Cary v. Board of Education*, 598 F.2d 535 (10th Cir. 1979) that there is a freedom of expression in the classroom protected by the First Amendment that prohibits the censorship or suppression of expressions by school teachers in the classroom, as a violation of constitutional rights. The Seventh Circuit, in *Zykan v. Warsau Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980), determined that the

First Amendment guarantees academic freedom of teachers so that school boards cannot fire teachers for random comments in the classroom nor remove books from the library as part of a purge of all material offensive to their single, exclusive perception of the world. The First Circuit in the case of *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) says that the freedom of speech provision of the First Amendment protects a teacher's method or technique of teaching. The controversy that has arisen because of the conflict in law between the Circuits, as well as within a Circuit itself, has led to a situation where individual rights are being violated. The First Amendment right of free speech is not being upheld in a uniform manner between the Circuits.

2. Important Question of Federal Law: Standard of Review by Circuit Court of Appeals

The Fifth Circuit Court of Appeals has ruled in the case of *Reeves v. Clayborne County Board of Education*, 828 F.2d 1096 (5th Cir. 1987) that a trial judge's ruling cannot be overturned unless there is a showing of abuse of discretion by the Court. The Court has further ruled that a jury verdict cannot be overturned unless it violates the reasonableness test. The Fifth Circuit Court of Appeals' ruling in the case at bar and in the case of *Price*, 874 F.2d at 257, has changed the standard in First Amendment cases by allowing the appellate panel to review the facts de novo to determine whether the speech in question rose to the protected level and whether there was a violation of free speech. The Fifth Circuit appears to have two standards of review, while the First, Seventh, Eighth, Tenth, Eleventh and the Federal Circuit follow the rule of

"clearly erroneous" or "abuse of discretion" by the Trial Court prior to the changing of any ruling by that court. This appears to be in tune with the Court's ruling in *Amadeo v. Zants*, 486 U.S. 214, 100 L.Ed.2d 249, 108 S.Ct. 1771, (1988), where the Court, interpreting Rule 52(a) of the Federal Rules of Civil Procedure, prescribed that the standard for appellate review on fact findings would be the clearly erroneous rule. The Second, Third and Fourth Circuits have not ruled. However, the Fifth Circuit has ruled in *Price*, 874 F.2d at 257, and the case at bar to the contrary, saying that there is a right to decide whether speech has risen to a protected level. The Sixth and Ninth Circuit have followed the minority view as to the standard of review. The Ninth Circuit case of *Jews for Jesus, Inc. v. Board of Airport Comrs.*, 785 F.2d 791 (1986), *affd.* 482 U.S. 569, 96 L.Ed.2d 500, 107 S.Ct. 2568 (1987), is a case where the Court of Appeals, using the de novo standard, found the Board of Airport Commissioners prohibition in violation of free speech. That was affirmed by the Court, but the standard of review is in conflict with the majority of the Circuits and the Court itself.

The standard of appellate review must be both consistent and known in order to have uniform interpretation of the law. The division of opinions between the Circuits and the uncertainty within the Fifth Circuit itself as to the standards of review lend itself to a review by this Court.

CONCLUSION

For these reasons, and to prevent the prior restraint of free speech by the Respondent in the future, the Court should issue a writ of certiorari and review the judgment rendered by the Court of Appeals.

Respectfully submitted,

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APPENDIX

Timothy KIRKLAND, Plaintiff-Appellee,

v.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT, Defendant-Appellant.

No. 88-5640.

United States Court of Appeals,
Fifth Circuit.

Dec. 22, 1989.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This civil rights action arose as a consequence of the non-renewal of a probationary teacher's employment contract. The nontenured public school teacher sought relief under 42 U.S.C. § 1983 for alleged violations of his constitutional rights. We are asked to decide whether the first amendment empowers public school instructors to teach from their own individual reading lists, in substitution for those supplied by schools as part of their official curricula, without first procuring administrative approval.

We conclude that the teacher's use of the supplemental list does not fall within the rubric of constitutionally protected speech. The case presents a matter of private, not public concern. It is misleading to suggest, as the teacher does here, that this dispute touches upon the public's concern over censorship of books and one's ideological views. Since school officials were never afforded

an opportunity to pass judgment upon the reading list, such censorship, or the threat thereof, is entirely speculative.

We conclude that the first amendment does not vest public school teachers with authority to disregard established administrative mechanisms for approval of reading lists. Public schools have a legitimate pedagogical interest in shaping their own secondary school curricula and in demanding that their teachers adhere to official reading lists unless separate materials are approved. The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers.

We conclude that the district court erred in failing to hold as a matter of law that the teacher suffered no impairment of his first amendment rights and that this case involves a private dispute concerning his qualifications for continued teaching employment. Irrespective of the jury verdict, the school district is not liable to the plaintiff under section 1983 in light of the facts presented and, accordingly, we reverse.

I.

Plaintiff Timothy Kirkland served as a probationary history teacher for two academic years at a high school within the defendant Northside Independent School District ("Northside"). Northside declined to renew Kirkland's employment contract for the 1988-89 academic year, allegedly as a consequence of his use of a nonapproved reading list in his world history class, poor supervision of a special-discipline class, substandard teaching

evaluations, and poor interaction with parents, students, and fellow teachers. Kirkland believes that his supervisors' complaints are pretextual justifications for nonrenewal of his contract; he asserts that in fact Northside dismissed him in order to censor the contents of his supplemental reading list.

It is undisputed that Northside provided Kirkland with a supplemental reading list for his 1986-87 history classes along with a copy of the guidelines used to develop and amend that list. Kirkland was aware of the guidelines and understood that, if he were dissatisfied, a separate body of reading material could be used in his classes if he obtained administrative approval. Kirkland, however, declined to procure Northside's approval of his substitute list[1] and, accordingly, Northside was never afforded the opportunity to review the list.

Northside's supplemental reading list for world history included approximately ninety books, several of which are works of fiction.[2] By comparison, Kirkland's list of forty-seven books are almost *exclusively* fictional.[3]

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[1] Kirkland offered his world history students his own reading list for purposes of extra credit, affording them the opportunity to read the material and submit book reports.

[2] The fictional books on Northside's list include Orwell's *Animal Farm*, Lederer's *The Ugly America*, Herr's *Dispatches*, Fenelon's *Playing for Time*, Dickens's *Great Expectations*, Cervantes's *Don Quixote of the Mancha*, White's *The Once and Future King*, and More's *Utopia*.

[3] For purposes of extra credit in world history, Kirkland recommended such novels as London's *Call of the Wild*, Knowles's *A Separate Peace*, Kafka's *The Trial*, Hemmingway's *A*

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Significantly, most of the books on Kirkland's list were already recommended reading for Northside's English courses, and all were available in the school's library.

As a general principle, Northside's reading lists for its separate courses are compiled for classroom use through an administrative process in which input is solicited at public hearings from parents, teachers, and professional educators.[4] Northside's guidelines require that books under consideration for addition to reading lists must conform to several criteria, two of which are imposed without exception: (1) The material must be examined and recommended by a member of Northside's staff, and (2) the material must "implement or enrich" the curriculum. Other criteria are applied selectively, depending upon the nature of the book scrutinized.[5]

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Farewell to Arms, Fitzgerald's *The Great Gatsby*, Defoe's *Robinson Crusoe*, and Conrad's *Heart of Darkness*. The list also included spy novels, such as LeCarre's *Tinker, Tailor, Soldier, Spy* and Ludlum's *The Parsifal Mosaic*.

[4] Kirkland admitted to never having attended public hearings to register objections to the world history list supplied to him or to the use of school-supplied lists in general.

[5] The cost of the recommended book can be considered. In addition, depending upon the age of the student readers, books can be eliminated because of their treatment of profanity, sex, or violence. Materials designed to promote religion or indoctrinate students, or that have no historical value, are deemed not suitable for approval. Moreover, materials that "unfairly, inaccurately, or viciously treat a particular race, sex, ethnic group, age group, [or] religion" cannot be selected unless a "legitimate educational purpose" is demonstrated.

School officials responsible for supervising Kirkland recommended that his contract not be renewed at the end of 1987-88 academic year, and he received timely notice of Northside's decision to dismiss him upon completion of his contract. Upon request, he was heard before Northside's Board of Trustees, who reaffirmed the recommendation.

Kirkland sued Northside, alleging violations of his procedural due process and first amendment guarantees, as well as state law contractual violations. The case was tried before a jury. Upon completion of the evidence, the court rendered a partial directed verdict in favor of Northside as to the procedural due process and contractual claims. The court concluded that a probationary teacher was not entitled to procedural due process protection and that, since Kirkland was not terminated before the expiration of the academic year, no state law breach-of-contract claim existed.

Nevertheless, the court refused to direct a verdict as to the remaining first amendment claim. Despite Northside's motion, the court declined to address the preliminary legal issue of whether Kirkland's reading list constituted protected speech under the first amendment. Instead, over Northside's objection the court submitted, to the jury, special interrogatories that effectively delegated the first amendment determination thereto.[6]

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[6] Special interrogatory number 1 provides,

> Do you find that the plaintiff has established, by a preponderance of the evidence, that the defendant

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The jury answered the special interrogatories in favor of Kirkland and awarded $50,000 in damages. The trial court awarded attorneys' fees and postjudgment interest and ordered Northside to renew Kirkland's teaching contract for the following academic year. On appeal, Northside advances the argument that the court committed reversible error in not making the initial legal determination that the first amendment does not even apply in this dispute and, alternatively, that Kirkland is not entitled to reinstatement.[7] It asserts that this dispute is entirely a matter of private concern involving one teacher's employment qualifications.

Kirkland does not appeal the directed verdict rendered against him with respect to the procedural due process or state law contractual claims. However, he does argue that this case involves blatant censorship of his

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> disapproved of the book list that he distributed to his students in order to suppress an ideological or religious viewpoint with which the defendant disagreed?

Special interrogatory number 2 states,

> Do you find that the plaintiff has established, by a preponderance of the evidence, that the plaintiff's distribution of the book list was a substantial or motivating factor in the defendant's decision not to renew his contract?

[7] Because this appeal turns upon the threshold determination that the first amendment does not apply here, we need not address the issue of reinstatement. *See Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 74 L.Ed.2d 708 (1983) (federal courts will not intrude into employment decisions if the speech in question is not constitutionally protected).

ideological views and that, as such, it raises a matter of public concern under first amendment jurisprudence. Specifically, plaintiff urges that school officials cannot squelch nonconforming viewpoints regarding what should be taught in public classrooms. Since matters of public concern, such as censorship, that are raised by public school teachers merit first amendment protection and bar retaliatory discharge, Kirkland believes that the trial court committed no error in submitting the special interrogatories to the jury and in ordering reinstatement after the favorable verdict.

II.

The first amendment's concise guarantee that every citizen may freely criticize the government without retaliation requires that we determine, in this case, whether a school district has breached this commandment with respect to one of its teachers. To prevail on his constitutional claim, Kirkland must establish a prima facie case (1) that his supplemental reading list is constitutionally protected speech and (2) that such speech proved to be a substantial or motivating factor in the decision not to rehire him. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). If Kirkland successfully carries the initial burden, Northside, in order to avoid liability, must then demonstrate by a preponderance of the evidence that it would not have rehired Kirkland even in the absence of the protected speech. *See Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576.

In *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Court announced that the question of whether a public employee's speech is constitutionally protected turns upon the "public" or "private" nature of such speech. *See id.* at 146-48, 103 S.Ct. at 1689-91; *Ferrara*, 781 F.2d at 1512. The distinction is based upon the principle that "speech on public issues occupies the 'highest rung of the heirarchy [sic] of first Amendment values' and is entitled to special protection." *Connick*, 461 U.S. at 145, 103 S.Ct. at 1689 (citing *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 3425, 73 L.Ed.2d 1215 (1982), and *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980)). For purposes of appellate review, the "inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n. 7, 103 S.Ct. at 1690 n. 7. Consequently, we are entitled to review *de novo* the trials court's determination concerning the protected nature of Kirkland's reading list.[8]

The definition of "matters of public concern" is imprecise.[9] As the *Connick* Court stated, "Whether an

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[8] *See Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir.1988) (question of whether an employee's speech addresses a matter of public concern merits independent review of record as a whole); *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 n. 2 (5th Cir. 1986) (same), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

[9] Justice Scalia notes that the concept of "public concern" has been described variously, but all attempts fail to advance the definition beyond the circular statement that "speech on matters of public concern is that speech which lies 'at the heart of the First Amendment's protection.' " *Rankin v. McPherson*, 483 U.S. 378, 395, 107 S.Ct. 2891, 2902, 97 L.Ed.2d 315 (1987) (Scalia, J., dissenting) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1407, 1415, 55 L.Ed.2d 707 (1978)).

employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48, 103 S.Ct. at 1690-91; *Moore v. City of Kilgore*, 877 F.2d 364, 369 (5th Cir.1989), *petition for cert. filed*, 58 U.S.L.W. 3306 (U.S. Oct. 16, 1989) (No. 89-630). For our purposes, the concept is perhaps best understood by scrutinizing what has or has not been held to be a matter of public concern.[10]

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[10] For example, protesting the President's policies by commenting favorably upon an assassination attempt against his life is a matter of "public concern" meriting protection. *Rankin v. McPherson*, *id.* 483 U.S. at 386-87, 107 S.Ct. at 2897-98. Similarly, a public school teacher may publicly protest the school board's allocation of resources between athletics and academics, *Pickering v. Board of Educ.*, 391 U.S. 563, 571, 88 S.Ct. 1731, 1736, 20 L.Ed.2d 811 (1968), or a school's alleged racially discriminatory policy in a private conversation with the principal, without suffering retaliatory dismissal, *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979). We have held that public employees raise matters of public concern if they criticize the special attention paid by the policy to a wealthy neighborhood, *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir.1986), or the implementation of a federally funded reading program, *Wells v. Hico Ind. School Dist.*, 736 F.2d 243, 249 (5th Cir.1984), *cert. dismissed*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985). Moreover, the quality of nursing care given to a group of people, including inmates, is a matter of public concern, *Frazier v. King*, 873 F.2d 820, 825 (5th Cir.1989), *cert. denied*, 1989 U.S. LEXIS 5565, ___ U.S. ___, 109 S.Ct. ___, ___ L.Ed.2d ___ (Nov. 27, 1989) (No. 89-540), as is the adequacy of a fire department's level of manpower, *Moore v. City of Kilgore*, 877 F.2d 364, 370-71 (5th Cir.1989), *petition for cert. filed*, 58 U.S.L.W. 3306 (U.S. Oct. 16, 1989) (No. 89-630).

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It is well settled that even nontenured public school teachers do not shed first amendment protection in speaking on matters of public concern. *See Mt. Healthy*, 429 U.S. at 283-84, 97 S.Ct. at 574-75; *Pickering*, 391 U.S. at 574, 88 S.Ct. at 1737; *Givhan*, 439 U.S. at 415-16, 99 S.Ct. at 696-97; *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 549 (5th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). The rationale is that public employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as "citizens" and not as "employees." *See Terrell*, 792 F.2d at 1362. Thus, issues do not rise to a level of "public concern" by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his

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However, public employees raise matters of "private concern" if they criticize the morale problems or transfer policies at the district attorney's office, *Connick*, 461 U.S. at 148-49, 103 S.Ct. at 1690-91; or criticize the performance of co-employees and supervisors, *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 550-51 (5th Cir.1989); *Terrell*, 792 F.2d at 1362-63; or protest an employer's unfavorable job evaluation, *Berg v. Hunter*, 854 F.2d 238, 243-44 (7th Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1314, 103 L.Ed.2d 583 (1989); *Day v. South Park Ind. School Dist.*, 768 F.2d 696, 700 (5th Cir.1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986). *See generally* Allred, "From *Connick* to Confusion: The Struggle To Define Speech on Matters of Public Concern." 64 Ind.L.J. 43 (1988) (noting the difficulty which courts have had since *Connick* in defining what constitutes public speech).

role as a citizen and not in his *role as an employee* of the school district.[11] *Accord id.*

If the nature of the speech is purely private, such as a dispute over one employee's job performance,[12] a non-tenured school teacher enjoys no first amendment protection as to that speech. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690.[13] Judicial inquiry then comes to an end, and the

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[11] As the *Connick* Court states, "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." 461 U.S. at 149, 103 S.Ct. at 1691. The Court also carefully noted that a matter "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Id.* at 148 n. 8, 103 S.Ct. at 1691 n. 8.

[12] *See Day*, 768 F.2d at 700 (teacher's dispute with principal concerning negative performance evaluation is "purely a private matter"); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (teacher's dispute with colleagues and superiors about course content not a matter of public concern), *cert denied*, 411 U.S. 972, 93 S.Ct. 2148, 36 L.Ed.2d 695 (1973).

[13] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Connick, 461 U.S. at 146-47, 103 S.Ct. at 1689-90.

question of whether the employee's speech was a substantial or motivating factor in the decision not to rehire him need not even be reached. *Ferrara*, 781 F.2d at 1512.

If, however, the employee's speech relates to a matter of "public concern" and is deemed to have been a substantial or motivating factor in failing to rehire the teacher, the inquiry advances. At this point, courts must balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. *Accord Rankin*, 483 U.S. at 384, 107 S.Ct. at 2896; *Connick*, 461 U.S. at 140, 103 S.Ct. at 1686; *Givhan*, 439 U.S. at 414, 99 S.Ct. at 696.

Pickering thus recognizes that a teacher's free speech protection, even as to a matter of public concern, is not absolute. *Ferrara*, 781 F.2d at 1513. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. Consequently, a public school employer who retaliates against a teacher for engaging in protected speech does not *automatically* violate the Constitution. *Ferrara*, 781 F.2d at 1513.

Pickering recognizes the need to balance competing interests. For example, situations may exist in which the need for confidentiality between the governmental employer and employee is so great, or the relationship is so personal and intimate in nature, that public criticism of the employer may furnish grounds for dismissal without

violating the first amendment. 391 U.S. at 570 n. 3, 88 S.Ct. at 1735 n. 3. Nevertheless, should the factual analysis advance to a balancing of the employer's and employee's interests under *Pickering*, the employee's offensive words or conduct cannot be scrutinized in a vacuum. Federal courts should focus upon the manner, time, and place of the employee's expression, as well as the context in which the dispute arose. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2898. *Accord Connick*, 461 U.S. at 152-53, 103 S.Ct. at 1692-93; *Givhan*, 439 U.S. at 415 n. 4, 99 S.Ct. at 696 n. 4; *Price v. Brittain*, 874 F.2d 252, 256-59 (5th Cir.1989).

III.

Having set the analytic framework, we conclude that the inquiry here does not advance to a balancing of Kirkland's and Northside's interests under *Pickering*. In fact, it fails to advance beyond the threshold inquiry of whether the case presents a matter of public or private concern. With little difficulty, we find that Kirkland's use of his separate reading list for world history is not a matter of public concern under the facts presented.

Irrespective of Kirkland's interest in the subject matter of reading lists, Kirkland did not speak out as a citizen when he offered a separate body of material for world history. He never attended public meetings to register his opposition to Northside's world history reading list; prior to the adverse employment decision, he never announced to colleagues, superiors, or the public that the school-supplied list impinged upon his right to speak freely; and, most significantly, he never afforded Northside an opportunity to pass upon the merits of his list. Since most

of Kirkland's recommended material was already included in the lists of other academic subjects, and all were otherwise available in the school library, Kirkland's fear of censorship is entirely speculative. He raised the issue of censorship only after school officials decided not to renew his contract; Kirkland now attempts, unpersuasively, to cloak his substandard job performance in first amendment protection.

This case differs from most first amendment disputes in that Kirkland remained mute with respect to Northside's so-called "brutal censorship" until notified of Northside's decision not to rehire him. In *Terrell*, we held that a police officer suffered no first amendment injury when he was fired as a consequence of critical comments aimed at the police chief, written in strict confidence in the officer's own notebook. 792 F.2d at 1362. We were persuaded by the fact that the discharged officer "made no effort to communicate the contents of the notebook to the public, and the evidence does not suggest that he would have any occasion to do so." *Id.* at 1362-63.

Thus, while an employee need not publicly announce a matter of general concern in protest, and may use private channels instead,[14] he cannot remain mute and thereafter self-servingly label his conduct to be a matter of public concern.[15] Kirkland had ample opportunity to

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[14] *See Givhan*, 439 U.S. at 413, 99 S.Ct. at 695 (teacher's private communication with principal concerning alleged racially discriminatory policies protected by first amendment).

[15] *See also Fowler v. Board of Educ.*, 819 F.2d 657, 663-64 (6th Cir.) (teacher's showing of R-rated movie to students as entertainment while grades were being posted was not expressive

(Continued on following page)

present any concerns over censorship, either privately to his supervisors or publicly to Northside's trustees. He admitted that he fully understood that administrative guidelines were available in order to have a substitute list approved. However, he declined to act or to speak upon the very matter which he equated, before the jury, with nazi-style censorship.

Contrary to Kirkland's suggestion, this case fails to present a matter of public concern with respect to censorship of reading material or a teacher's "academic freedom." Thus, the concept of academic freedom has been recognized in our jurisprudence,[16] the doctrine has never conferred upon teachers the control of public school curricula.[17]

(Continued from previous page)

or communicative within meaning of first amendment), *cert. denied*, 484 U.S. 986, 108 S.Ct. 502, 98 L.Ed.2d 501 (1987).

[16] *See Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967) (academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Hillis*, 665 F.2d at 553 (academic freedom is recognized in the case law but is ill-defined).

[17] *See, e.g., Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("first amendment does not require that each nontenured professor be made a sovereign unto himself" with respect to course content, homework and grading policy); *Hillis*, 665 F.2d at 552-53 (teachers do not have first amendment right to control grading); *Palmer v. Board of Educ.*, 603 F.2d 1271, 1273 (7th Cir.1979) ("First Amendment [is] not a teacher license for uncontrolled expression at variance with established curricular content"), *cert. denied*, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980); *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir.)

(Continued on following page)

In *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the Court recognized that public school officials could impose, consistently with the first amendment, reasonable restrictions upon the subject matter of a student-published newspaper. Since schools are typically not public forums, *id.* at 267, 108 S.Ct. at 567-68, restrictions upon speech can be imposed in public schools as long as the constraints are "reasonably related to legitimate pedagogical concerns," *id.* at 273, 108 S.Ct. at 571. Although the Court focused upon students' speech, it nonetheless recognized that if, as here, no public forum has been created, "school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community." *Id.* at 267, 108 S.Ct. at 568 (emphasis added).[18]

Kirkland, however, adopts the position that his control of the world history class curriculum is unlimited.[19] At trial, he stated during cross-examination that,

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(Continued from previous page)

(first amendment not violated when school refused to rehire teacher because her teaching philosophy was incompatible with the pedagogical aims of university), *cert. denied*, 414 U.S. 1075, 94 S.Ct. 592, 38 L.Ed.2d 482 (1973).

[18] *See also* Hafen, "*Hazelwood School District* and the Role of First Amendment Institutions," 1988 Duke L.J. 685, 704-05 (first amendment protects not only individual students and teachers, but the educational integrity of public schools).

[19] Kirkland is not alone when he argues that his authority to shape public school curricula supersedes that of competing groups. It appears to be a position increasingly adopted by school teachers. *See* Ingber, "Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools," 1987 U.Ill.Rev. 15, 34-37.

although it would be professionally unwise, he could freely use sexually explicit magazines in his classroom instruction. At oral argument, his counsel also admitted that, if so inclined, Kirkland could limit reading material to subject matter consistent with his own political concerns, such as nuclear disarmament, despite being entrusted with the teaching of a class in world history.

We reject Kirkland's position concerning the scope of his first amendment rights as being at odds with controlling, well-settled precedent. Moreover, if the efforts of Northside to restrict teachers' control over the public school curricula were deemed to constitute "censorship," so presumably would Kirkland's attempts to override to preferences of the trustees, administrators, and parents.[20] While teachers may have special competence in methods of classroom instruction, they have no special skill in making final curricular decisions. "The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime." Yudof, "When Governments Speak: Toward a Theory of Government Expression and the First Amendment," 57 Tex.L.Rev. 863, 865 (1979). It does not matter, for purposes of influencing young minds, whether such power is exercised, to the exclusion of others, by the government or public school teachers.

Kirkland's reliance upon *Givhan*, for the proposition that the district court properly submitted the first amendment issue to the jury, is also misplaced. *Givhan* is distinguishable in that the teacher in that case protested the

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[20] *See* Ingber, *supra* note 19, at 37.

allegedly racially discriminatory policy, admittedly a public concern, in a private conversation with her superior. She did not, like Kirkland, hold her silence and then allege a first amendment tort when her contract was not renewed.

Kirkland never afforded Northside the opportunity to approve his list and, in addition, he never spoke as a citizen either through public or private channels. Having remained mute as to any censorship he may have suffered, he belatedly suggests that Northside's decision not to renew his contract was inspired, in a substantial or motivating degree, by a desire to retaliate against him for his exercise of free speech. The facts do not support his conclusion.

Our decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the first amendment, nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be "cast with a pall of orthodoxy." We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula. Parents, administrators, and elected officials also have a legitimate role in the process of selecting material that will advance educational goals, a role that cannot lightly be assumed by teachers alone. Thus, when an administrative process is established to compile and amend officially approved material with input from parents, administrators, and educators, teachers must respect that process.

IV.

In summary, we conclude that Kirkland's world history reading list does not present a matter of public concern and that this case presents nothing more than an ordinary employment dispute. Accordingly, Kirkland's conduct in disregarding Northside's administrative process does not constitute protected speech, and any inquiry into the reasons for the nonrenewal of his employment contract is unnecessary. The district court erred when it failed to hold as a matter of law that Kirkland suffered no constitutional injury. We thus REVERSE the judgment of the district court and RENDER judgment in favor of Northside.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-5640

TIMOTHY KIRKLAND,

Plaintiff-Appellee,

versus

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(January 25, 1990)

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR
THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE.

/s/ Jerry E. Smith
United States Circuit Judge

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-5640

D.C. Docket No. SA-87-CA-1092

TIMOTHY KIRKLAND,

Plaintiff-Appellee,

versus

NORTHSIDE INDEPENDENT
SCHOOL DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

JUDGMENT

(Filed December 22, 1989)

(Filed April 2, 1990)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and rendered in favor of Northside Independent School District, in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

December 22, 1989

ISSUED AS MANDATE:

Test: GILBERT F. GANUCHEAU
Clerk: U.S. Court of Appeal,
Fifth Circuit
By: /s/ Dawn Eiserlah
Deputy

New Orleans, Louisiana
3/29/90

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TIMOTHY KIRKLAND, Plaintiff,	§	CIVIL ACTION
VS.	§	NO.
NORTHSIDE INDEPENDENT SCHOOL DISTRICT, Defendant.	§	SA-87-CA-1092

JUDGMENT
(Filed Oct. 14, 1989)

It is **ORDERED, ADJUDGED, AND DECREED** that the plaintiff, Timothy Kirkland, do have and recover of and from the defendant, Northside Independent School District, the principal sum of $50,000.00, plus attorney's fees and costs in the sum of $16,826.80, plus postjudgment interest on the combined sum at the rate of 8.04% per annum.

It is further **ORDERED, ADJUDGED, AND DECREED** that the defendant, Northside Independent School District, reinstate the plaintiff, Timothy Kirkland, to a probationary-contract teaching position effective for the fall semester of 1989.

DATED this 14th day of October, 1988.

/s/ D. W. Suttle
D. W. SUTTLE
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TIMOTHY KIRKLAND, Plaintiff, VS. NORTHSIDE INDEPENDENT SCHOOL DISTRICT, Defendant.	§ § § § § § § §	CIVIL ACTION NO. SA-87-CA-1092

SPECIAL INTERROGATORIES
(Filed Oct. 3, 1988)

1. Do you find that the plaintiff has established, by a preponderance of the evidence, that the defendant disapproved of the book list that he distributed to his students in order to suppress an ideological or religious viewpoint with which the defendant disagreed?

ANSWER: Yes
"Yes" or "No"

2. Do you find that the plaintiff has established, by a preponderance of the evidence, that the plaintiff's distribution of the book list was a substantial or motivating factor in the defendant's decision not to renew his contract?

ANSWER: Yes
"Yes" or "No"

If you have answered "Yes" to interrogatory #2, then answer interrogatory #3. If you have answered "No" to interrogatory #2, do not answer any further interrogatories.

3. Do you find that the defendant has established, by a preponderance of the evidence, that it would not have renewed the plaintiff's contract even if he had not distributed the book list to his students?

ANSWER: No
"Yes" or "No"

If you have answered "No" to interrogatory #3, then answer interrogatory #4. If you have answered "Yes" to interrogatory #3, do not answer any further interrogatories.

4. What sum of money do you find from a preponderance of the evidence would fairly compensate the plaintiff for the damages he has suffered?

ANSWER (in dollars and cent): $50,000.00

/s/ Kathryn Samford
FOREPERSON
DATE: 10/3/88

HISTORY READING LIST PART I

Northwest Passage – Roberts

The Light in the Forest – Richter

Pale Horse, Pale Rider – Porter

The Bridges at Toko-Ri – Michner

Heartbreak Pass – MacLean

The Parsifal Mosaic – Ludlum

Call of the Wild – London

The Sea Wolf – London

Babbitt – Lewis

Main Street – Lewis

Arrowsmith – Lewis

Tinker, Tailor, Soldier, Spy – LeCarre

Comstock Lode – L'Amour

A Separate Peace – Knowles

Captain's Courageous – Kioling

Andersonville – Kantor

The Trial – Kafka

Brave New World – Huxley

The Rise of Silas Lapman – Howells

The Prisoner of Zenda – Hope

Goodbye Mr. Chips – Hilton

A Bell for Adano – Hersey

Steppenwolf – Hesse

Across the River and into the Trees – Hemingway

A Farewell to Arms – Hemingway

The Sun Also Rises – Hemingway

For Whom the Bell Tolls – Hemingway

House of the Seven Gables – Hawthorne

Tess of the D'Urbervilles – Hardy

The Vicar of Wakefield – Goldsmith

The Devil's Alternative – Forsyth

Captain Horation [sic] Hornblower – Forester

The Great Gatsby – Fitzgerald

As I Lay Dying – Faulkner

Intruder in the Dust – Faulkner

Light in August – Faulkner

Rebecca – DuMaurier

Three Musketeers – Dumas

Hound of the Baskervilles – Doyle

The Robe – Douglas

Old Curiosity Shop – Dickens

Robinson Crusoe – Defoe

The Open Boat – Crane

The Deerslayer – Cooper

Lord Jim – Conrad

Heart of Darkness – Conrad

Death Comes for the Archbishop – Cather

This is a partial reading list. An additional list will follow. If you wish to read one of these books for an extra credit report first get the approval of your instructor. Then have your parent/guardian fill in and sign the statement below. This must be done *no less* than *two weeks prior* to turning in the report.

As parent/guardian of

_____ (student name)

I give my permission for
him/her to read the book:

_____ (title)

for a book report in history.

_____ (signature)

_____ (signature)

_____ (date)

_____ (phone number)

Defendant's Exhibit B

No. 89-1665

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY KIRKLAND,

Petitioner,

vs.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourth Supreme Judicial District

BRIEF OF RESPONDENT, NORTHSIDE INDEPENDENT SCHOOL DISTRICT

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No. 89-1665

In The

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TIMOTHY KIRKLAND,

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NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourth Supreme Judicial District

BRIEF OF RESPONDENT, NORTHSIDE INDEPENDENT SCHOOL DISTRICT

Respondent Northside Independent School District respectfully requests this Court to deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals, Fifth Circuit rendered on December 22, 1989. That opinion is reported at 890 F.2d 794.

STATEMENT OF THE CASE

Petitioner, Timothy Kirkland, served as a probationary teacher for two academic years for the Northside Independent School District. His contract was not renewed for the 1988-1989 school year. The reasons given for his nonrenewal were use of a nonapproved reading list in his World History class, poor supervision of a special-discipline class, substandard teaching evaluations and poor interaction with parents, students and fellow teachers. The primary focus of Kirkland's suit and this petition is that his First Amendment rights were violated by Northside's requirement that he obtain administrative approval for use of his own supplemental reading list for his World History class. A supplemental reading list for that subject had been adopted by Northside. The district-wide list had been prepared by a process that included teacher, administrator and parent input. A teacher was permitted to use his own supplemental list once it was approved by the administration.

It is undisputed that Kirkland knew of the existence of the approved book list and its method of adoption prior to his distribution of his own list. Further, Kirkland knew of the procedures for substituting his own list or for adding selections to the approved list. It is also undisputed that Kirkland failed to make any attempt to obtain administrative approval of his reading list but simply gave it to the students. His list of forty-seven (47) books for a World History class was almost exclusively fiction. Most of the books on Kirkland's list were already on supplemental reading lists for Northside's English courses and all the books were available in the school's library. Finally, it is undisputed that Kirkland never

raised any objections to or First Amendment questions concerning the supplemental book list procedures until after he learned of his proposed nonrenewal. What had been a failure to follow a curriculum development policy in the fall of 1987 belatedly materialized into an act of First Amendment principle when he learned of his proposed nonrenewal in the spring of 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE PETITIONER'S FAILURE TO FOLLOW DISTRICT POLICY ON UTILIZATION OF A SUPPLEMENTAL READING LIST WAS A MATTER OF PRIVATE CONCERN NOT RISING TO A CONSTITUTIONALLY PROTECTED RIGHT.

The Fifth Circuit correctly applied the law as stated in *Connick v. Myers*, 461 U.S. 146, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983), in holding that Kirkland's failure to follow Northside's policy on supplemental book lists was not a matter of public concern and therefore did not give rise to a federal civil rights cause of action.

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. Myers, supra at 148.

Viewing "the content, form and context of"[1] Kirkland's failure to follow Northside's policy on supplemental reading lists, his conduct cannot be found to have represented any statement concerning an issue of public concern. Kirkland's actions involved the curriculum development process of Northside and his belief that he alone should choose the books on his reading list. Neither his actions nor that of Northside gave any indication that Kirkland was raising an issue of public concern about censorship until the question of his nonrenewal arose several months after his action on the book list. If he had followed the District's policy, there is no indication in the record that any of the materials on Kirkland's list would have been rejected for other than sound curriculum reasons. The fact that the vast majority of the books were on approved reading lists for other courses and that all of the books were in the school library certainly does not support Kirkland's claim that the District was in some manner attempting to stifle his freedom of speech. As held by the Fifth Circuit after reviewing the parties' actions in the context in which they were taken, this case "presents nothing more than an ordinary employment dispute" which does not give rise to a civil rights violation. *Kirkland v. Northside I.S.D., supra* at 802.

II. THE QUESTION OF WHETHER PETITIONER's CONDUCT WAS PROTECTED SPEECH WAS A QUESTION OF LAW NOT FACT, AND THEREFORE THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF APPELLATE REVIEW.

The Fifth Circuit was not required to apply a "clearly erroneous" or "abuse of discretion" standard of review to

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[1] Connick v. Myers, supra at 148-149.

the trial court's judgment because "the inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 38, 149, n. 7 (1983).

In footnote 10 of Connick, the Court states:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted).

Connick v. Myers, 461 U.S. 138, 151, n. 10 (1983).

Therefore, Petitioner's reliance upon cases involving review of factual findings by a trial court are not pertinent to the issue before this Court. Further, under any standard of review, the facts of this case do not support any other conclusion than that reached by the Fifth Circuit. Kirkland's conduct involved a matter of private concern and therefore did not involve constitutionally protected speech.

CONCLUSION

For the reasons set forth, Respondent Northside Independent School District prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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